IN THE SUPREME COURT OF THE STATE OF MONTANA

CASE NUMBER DA-10-0101

CHARLES LOKEY and VANESSA LOKEY,
Plaintiffs/Appellants,

v.

ANDREW J. BREUNER and A.M. WELLES, INC.,
Defendants/Appellees.

BRIEF OF APPELLEE A.M. WELLES, INC.

On Appeal from the District Court of the Eighteenth Judicial District,
Cause No. DV-08-57B

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ISSUE PRESENTED

1. Whether the District Court correctly granted A.M. Welles, Inc.'s Civil Rule 12(b)(6) Motion to Dismiss for failure to state a cause of action because Lokeys' Amended Complaint does not allege facts that would establish a breach of duty by the A.M. Welles semi-driver.

STATEMENT OF THE CASE

This lawsuit for bodily injury and loss of consortium arises out of the collision between a bicycle operated by Plaintiff Charles Lokey ("Lokey") and a pickup operated by the Co-Defendant Andrew J. Breuner ("Breuner"). Lokeys filed their original Complaint January 17, 2008, and A.M. Welles, Inc. ("Welles") was later added as a Defendant in October 2008. Welles filed a Civil Rule 12(b)(6) Motion to Dismiss on the grounds that there was no Montana precedent to establish a duty running to Plaintiffs from the Welles driver in the circumstances alleged in the Amended Complaint. The District Court granted Welles' Motion to Dismiss February 1, 2009. Thereafter, the remaining parties (Lokeys and Breuner) filed cross-motions for summary judgment, which the District Court denied in June 2009. On January 19, 2010, Lokeys filed a Motion for Rule 54(b) certification of the

District Court's February 1, 2009 Order granting Welles' Motion to Dismiss. The District Court granted Lokeys' request for Rule 54(b) certification by order dated February 6, 2009. Lokeys filed a timely Notice of Appeal. However, Lokeys' Notice of Appeal sought to appeal both the District Court's order dismissing Welles and part of the District Court's June 2009 order denying the cross-motions for summary judgment. This Court, in conducting its preliminary review of the Rule 54(b) certification, accepted review of the order dismissing Welles, but rejected Lokeys' request to review any other rulings by the District Court.

STATEMENT OF FACTS

As an appeal from a dismissal under Civil Rule 12(b)(6), the relevant inquiry concerns what Lokeys alleged in their Amended Complaint. For purposes of Welles' Motion to Dismiss, the District Court assumed that those facts were true. Lokeys' Appellants' Brief incorporates additional facts from discovery filed in the District Court. Consideration of the deposition testimony that Lokeys filed with the District Court merely strengthen Welles' position that there can be no finding of breach of duty by the Welles' driver as a matter of law.

The allegations of the Amended Complaint bearing on potential liability of Welles are as follows:

2. On September 7, 2006, Breuner stopped in heavy traffic on South 19th Avenue in Bozeman to wait for an opportunity to make a left turn into a private driveway, causing traffic congestion behind him.

3. Shortly thereafter, an employee of Welles, driving a Welles gravel truck with trailer, approaching from the opposite direction and seeing the traffic congestion Breuner caused, stopped and gestured for Breuner to turn.

4. The driver of the Welles truck had just overtaken Charles Lokey, who was riding his bicycle alongside the truck and trailer as near to the right side of the road as practicable, in compliance with the law.

5. Seeing the Welles truck driver's gesture, Breuner made his turn, directly in front of Lokey, who could not avoid collision.

* * *

8. The Lokeys' injuries and damages were caused by defendants' negligence, including but not limited to Breuner's negligence in creating the traffic congestion that compelled the Welles truck driver to stop and let him turn, the Welles truck driver's negligence in gesturing for Breuner to turn when he knew or should have known Charles Lokey was riding alongside his truck and trailer, and Breuner's negligence in making the turn and his failure to yield the right-of-way to Lokey.

[Amended Complaint, CR 26]

In summary, Plaintiffs' Amended Complaint alleges that the driver of the Welles gravel truck ("Welles driver") yielded the right-of-way to Breuner by stopping and signaling that Breuner could make a left turn in front of him. Contrary to the assertions in Lokeys' Brief, the Amended Complaint does not allege that the Welles driver was directing traffic. Rather, the behavior alleged is merely a part of courteous driving.

If the Court chooses to review the depositions Lokeys filed at the District Court in opposing Welles' Rule 12(b)(6) Motion to Dismiss, the allegations of courteous driving versus traffic direction are further confirmed. [See CR 36, Exh. 3 (Depo. of James Bohrman at 19-20) and Exh. 4 (Depo. of Breuner at 58)] Traffic was "real bad," southbound cars behind Breuner extended into the prior intersection and northbound cars stopped at the red light in front of the Welles driver extended to the entrance of the parking lot Breuner was attempting to enter. [Bohrman Depo. at 15-20] In other words, if the Welles driver had pulled forward to the next car at the stop light without leaving a gap, he would have prevented Breuner from turning until the light changed and traffic cleared. Neither Breuner nor the Welles driver testified that the Welles driver's hand signal was either intended or interpreted to mean anything other than that the Welles driver

was yielding his right-of-way. [Bohrman Depo. at 19-20, Breuner Depo. at 30, 58] [CR 36, Exhs. 3 and 4]

This fact pattern presents a question of first impression in Montana: whether a gesturing driver in these circumstances has a duty beyond yielding the gesturing driver's right-of-way. There is a split of authority nationally. For the reasons set forth below, it is respectfully submitted that the District Court decision in this case reflects the better result.

STANDARDS OF REVIEW

Pursuant to Mont. R. Civ. P. 12(b)(6), a motion to dismiss should be granted where the factual allegations of the complaint fail to state a claim upon which relief can be granted. For purposes of a Rule 12(b)(6) motion, all well pleaded allegations of fact are taken as true. The determination that a complaint fails to state a claim upon which relief can be granted is a conclusion of law which this Court reviews for correctness. *Stokes v. State ex rel. Mont. Dept. of Transp.*, 2005 MT 42, ¶ 6, 326 Mont. 138, 107 P.3d 494; *Cape v. Crossroads Correctional Center*, 2004 MT 265, ¶ 10, 323 Mont. 140, 99 P.3d 171.

If the Court accepts Lokeys' invitation to consider deposition testimony, the standard of review is the same as review of a summary

judgment under Civil Rule 56. Mont. R. Civ. P. 12(b). This Court reviews summary judgment rulings *de novo* using the same criteria applied by the District Court. *Schuff v. Jackson*, 2008 MT 81, ¶ 14, 342 Mont. 156, 179 P.3d 1169.

SUMMARY OF ARGUMENT

The determination whether a duty exists and, if so, the nature of the duty is a question of law that is made on a case-by-case basis. The factors considered in making that determination include foreseeability, moral blame, prevention of future harm, the extent of the burden placed on the defendant, the consequences to the public of imposing a duty, and the availability of insurance. See, e.g., *Hinkle v. Shepherd Sch. Dist. No. 37*, 2004 MT 175, ¶ 25, 322 Mont. 80, 93 P.3d 1239; *Jacobs v. Laurel Vol. Fire Dept.*, 2001 MT 98, ¶ 13, 305 Mont. 225, 26 P.3d 730. Foreseeability is not decided with hindsight. *Mang v. Eliasson*, 153 Mont. 431, 437, 458 P.2d 777, 781 (1969). The question is not whether it is foreseeable that an accident might occur. Because automobile accidents happen every day, there is no conduct that makes an accident impossible. The question, rather, is whether the Defendants' conduct foreseeably and unreasonably increased the risk that there would be an accident. Under the facts alleged in the

Amended Complaint, and when hindsight is eliminated, the Welles driver's conduct decreases rather than increases the risk of an accident. With the exception of the availability of insurance, which has never been a deciding factor of deciding whether a duty exists, the other factors weigh in favor of finding no duty.

Those states that have considered the issue have come to differing results. It is noteworthy, however, that a number of the cases that Lokeys cite as supporting their position involve special circumstances that are not present here, such as when an adult signals to a child to cross a roadway. In truly similar cases, the majority rule is not to allow recovery under the circumstances alleged in the Amended Complaint.

Because Lokeys mischaracterize the case when they suggest that the Welles driver was alleged to be directing traffic, their discussion of the duty imposed on volunteers is misapplied. That analysis might apply had the Welles driver truly been directing traffic, such as when someone stops at an accident scene and attempts to act as a quasi-law enforcement officer by directing traffic. Here, all the Welles driver was required to do was to continue to yield the right-of-way to Breuner, consistent with his hand signal.

ARGUMENT

1. The Factors that Determine the Duty Element in a Negligence Case Support the Dismissal of Welles.

The determination of the nature of a duty in a negligence case is a question of law that is decided by the Court. *Hinkle*, *supra* at ¶ 25; *Jacobs*, *supra* at ¶ 13. This determination is made on a case-by-case basis. *Mang*, *supra*. There are a number of factors to consider when deciding whether a duty exists, including foreseeability, moral blame, prevention of future harm, the extent of the burden placed upon the defendant, the consequences to the public imposing a duty, and the availability of insurance. *Hinkle*, *supra* at ¶ 21; *Jacobs*, *supra* at ¶ 18.

Among these factors, the question of foreseeability is of prime importance. *Mang*, *supra*, 153 Mont. at 437, 458 P.2d at 781. The court in *Mang* examined closely the element of foreseeability and noted that foreseeability involves a balancing of the perceivable risk against the interest which will be sacrificed to avoid the risk. This balance must not be examined with hindsight, but as it would have appeared at the time of the act or omission complained of:

> In the same vein, we quote with approval the following language from Harper and James, The Law of Torts, Volume 2, at page 929:
>
> '* * * Negligence is conduct involving an unreasonable risk of harm, and the test for determining whether a risk is unreasonable is supplied by the following formula. The amount of caution 'demanded of a person by an occasion is the resultant of three factors: the likelihood that his conduct will injure others, taken with the seriousness of the injury if it happens, and balanced against the interest which he must sacrifice to avoid the risk.'
>
> 'In striking this balance-that is, in weighing the likelihood of harm, the seriousness of the injury and the value of the interest to be sacrificed-the law judges the actor's conduct in light of the situation as it would have appeared to the reasonable man in his shoes at the time of the act or omission complained of. Not what actually happened, but what the reasonably prudent person would then have foreseen as likely to happen, is the key to the question of reasonableness * * *.'

Mang, supra, 153 Mont. at 436-37, 458 P.2d at 780-81. The court in *Mang* went on to summarize as follows:

> As a classic opinion states: 'The risk reasonably to be perceived defines the duty to be obeyed.' *Paulsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99, 100, 59 A.L.R. 1253. That is to say, defendant owes a duty with respect to those risks or hazards whose likelihood make the conduct unreasonably dangerous, and hence negligent in the first instance.

Id., 153 Mont. at 437, 458 P.2d at 781 (emphasis added).

When these principles are applied to the allegations of the Amended Complaint, this Court should conclude that there was no unreasonable risk to be foreseen. In fact, prior to the accident, the Welles driver would reasonably have perceived that he was reducing the risk, not increasing the risk, of an accident. The Amended Complaint alleges that just prior to the accident, the Defendant Breuner was stopped in "heavy traffic" and that while waiting for an opportunity to make a left turn he was "causing traffic congestion behind him." [Amended Complaint, ¶ 2 (CR 26)] In other words, what the Welles driver perceived was a hazardous circumstance that he did his part to alleviate. Had the Welles driver not stopped, there is no telling how long it would have been until Breuner had an opportunity to complete the left turn, during which time traffic congestion would presumably have gotten worse, increasing the risk of an automobile accident.[1]

The Welles driver was also entitled to assume that other drivers (and bicycle riders) would comply with Montana's traffic statutes. With respect to Lokey, Montana law holds a bicyclist to the same rules of the road as the

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[1]If the Court chooses to consider deposition testimony, had the Welles driver not stopped his truck where he did, his truck would have blocked Breuner's ability to make the left turn completely until the light turned green and the entire line of waiting traffic cleared. [CR 36, Exh. 3 (Bohrman Depo. at 16-18)]

operator of a motor vehicle. Section 61-8-602, MCA. Montana law makes it unlawful to pass a vehicle on the right side unless the roadway in that direction is at least two lanes wide or the vehicle being passed is making a left hand turn. Section 61-8-324, MCA. This accident occurred on a two-way street and the Welles truck was not turning.[2] With respect to the left-turning driver, Montana imposes upon a driver making a left turn the duty to yield to oncoming traffic and to proceed only when it is safe to do so. Section 61-8-336, MCA.

Other factors this Court examines when deciding whether a duty exists include moral blame, prevention of future harm, the extent of the burden placed on the defendant, the consequences of the public imposing the duty, and the availability of insurance. *Hinkle*, *supra*, at ¶ 21; *Jacobs*, *supra*, at ¶ 18. On balance, those factors support the District Court's decision to dismiss Welles from the lawsuit.

With respect to moral blame, both the facts alleged in the Amended Complaint and the information Lokeys submitted in the form of deposition testimony suggest no moral blame. To the contrary, the facts describe a courteous driver behaving in an exemplary fashion.

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[2]The street has since been widened to five lanes.

With respect to the prevention of future harm, a decision to expose Welles to liability under the circumstances of this case will not prevent future harm, and conceivably could increase the likelihood of future harm. It is not feasible for the Welles driver under the circumstances alleged in the Amended Complaint to make a reliable determination whether Breuner could safely make a left turn. A driver in congested traffic needs to be focusing primarily on hazards developing in front of the vehicle and can only occasionally glance in rear view mirrors to determine what is occurring alongside and behind the vehicle. It is well known that large trucks have significant blind spots alongside and behind the truck. Because it would be impossible to reliably determine whether the left turn could be made safely, the only logical lesson the public could take from a decision imposing potential liability on the Welles driver would be not to yield the right-of-way, proceed forward, and leave the left-turning driver to whatever delays and consequential congestions that might entail.

With respect to the extent of the burden placed upon the defendant, the defendant would face a choice of being a courteous driver and accepting the impossible burden of deciding whether it was safe to make a left turn or simply ignoring the plight of oncoming drivers. Drivers could avoid any

burden on themselves by exercising their right-of-way and letting traffic congestion continue to build. In these circumstances, the lesser burden is the worse policy.

The consequences to the public of imposing a duty dovetails with the discussion of prevention of future harm and the burden on the Defendant. While the ordinary citizen may not follow this case, professional truckers and trucking companies are more likely to keep abreast of these kinds of cases and adopt policies that minimize their potential liability. As a practical matter, the decision in this case may not effect how the average automobile driver behaves in a similar circumstance. If this Court creates potential liability under these circumstances, however, it is conceivable that at least some professional trucking companies will adopt policies discouraging their drivers from exercising these courtesies.

This Court has listed the availability of insurance as a factor, but has rarely discussed that factor. For example, in both *Hinkle*, *supra*, and *Jacobs*, *supra*, it is likely that there was available insurance, but that factor is not discussed. Given the wide availability of insurance, this factor may be more important where for some reason insurance is unavailable, which would greatly affect the burden placed upon the defendant. Given the many

available forms of insurance, the availability of insurance can cut multiple ways. Besides liability insurance for the truck driver, there is also automobile insurance for the left-turning driver, uninsured or underinsured motorist coverage available to anyone who owns a car, and other forms of insurance, such as health insurance and disability insurance, available to protect accident victims.

Finally, although not listed as a specific criteria in prior cases, this Court should also consider that the Montana Legislature has drafted an extensive traffic code with specific requirements applying to both bicyclists and left-turning drivers. There is no traffic code provision that prohibits or limits the exercise of courtesy by a driver faced with the circumstance alleged in the Amended Complaint.

2. The Welles Driver was not Directing Traffic, so He had no Duty to Determine When the Turn Could be Made Safely.

Much of Lokeys' analysis in their Appellants' Brief is a discussion of case law concerning the duty of a volunteer. That discussion is premised upon the assumption that the Welles driver was directing traffic. Neither the allegations in the Amended Complaint nor the additional deposition testimony that Lokeys submitted to the District Court and cited in their

appeal brief support a characterization that the Welles driver was directing traffic. The Amended Complaint allegations that are arguably pertinent to this question are contained in paragraphs 3 and 8 of the Amended Complaint. In paragraph 3, Lokeys allege that the Welles driver, "seeing the traffic congestion Breuner caused, stopped and gestured for Breuner to turn." Paragraph 8 sets forth the conduct Lokeys allege to be negligent and states:

> Breuner's negligence in creating the traffic congestion that compelled the Welles driver to stop and let him turn, the Welles truck driver's negligence in gesturing for Breuner to turn when he knew or should have known Charles Lokey was riding alongside his truck and trailer, and Breuner's negligence in making the turn and his failure to yield the right-of-way to Lokey.

These allegations fall short of alleging that the Welles driver was directing traffic. Rather, they allege common conduct of courteous drivers. It is no more appropriate to hold the Welles driver liable for negligently directing traffic than it would be to hold a shopper who opens a door to a store for an elderly patron liable if the patron then slips on a banana peel. In that situation, the courteous shopper invites the elderly patron to enter the store. It is unreasonable, however, to assume that the courteous shopper is indicating anything to the elderly patron other than that the shopper will

stand aside and keep the door open long enough for the patron to enter the store. It is not reasonable to expect the shopper to check for and verify that the surface beyond the door is free of hazards. Nor is it reasonable for the elderly patron to infer that the shopper is making any representation about the condition of the floor beyond the door.

Likewise, it is not reasonable to require a courteous driver yielding to an opposing left-turning driver in congested traffic to determine when "the coast is clear" and somehow communicate that information. Conversely, the left-turning driver could not reasonably infer anything from the Welles driver's conduct beyond that the Welles driver was yielding the right-of-way and would remain stopped until the left turn was completed.[3]

Both implicitly from the allegations in the Amended Complaint and explicitly in Appellants' Brief, the sole act of negligence alleged is that the Welles driver made a hand gesture. However, if the Welles driver had merely stopped his truck without making a hand gesture, any driver in Breuner's situation would understand the obvious purpose of the stop and

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[3]If the Court considers the deposition testimony that Lokeys filed with the District Court, it is noteworthy that there is no testimony that the Welles driver's hand signal was either intended or interpreted as a representation that the coast was clear. [See Bohrman Depo. at 19-20 and Breuner Depo. at 30, 58] [CR 36, Exhs. 3 and 4]

proceed to make the left turn. If the Welles driver made no hand signal, would Lokeys still allege Welles was negligent? Where is the line to be drawn? Since the incidental hand signal alleged in the Amended Complaint (and described by Breuner and Bohrman) would not likely change the outcome, the only logical options are to find no duty to check for other hazards or impose the duty on all courtesy stops.

3. The District Court's Discussion of Montana Code Annotated § 61-8-324 is a Red Herring.

Lokeys make much of the fact that the District Court commented that Lokey possibly violated § 61-8-324, MCA, which specifies when it is lawful to pass a vehicle on the right. Whether Lokey was complying with that statute is immaterial to the outcome of this appeal, and the District Court's comment concerning that statute arguably was dicta. If Lokey had been riding his bicycle in a bike lane, riding along a sidewalk, or riding off the surface of the street, the result would be the same. The key to the District Court's decision was its accurate assessment that:

> Welles was no more responsible for Lokey than he was for any other hundreds of drivers on the road. All persons are required to use ordinary care to prevent others from being injured as a result of their conduct, but there is no statute or case law in Montana which requires more of Welles given the facts of this case. There simply is no authority for Lokey's proposition for

> a driver who courteously yields his right-of-way to a left-turning driver is responsible for determining if all other lanes of traffic are clear of pedestrians or bicycles or whatever may be there.

[Order Granting Motion to Dismiss (CR 40 at 4)] The District Court's statement could correctly be expanded to include that the yielding driver is also not responsible for determining if bike lanes, trails or sidewalks are clear of pedestrians or whatever may be there. It is unreasonable, indeed impossible, to expect a truck driver in these circumstances to make that safety determination and to convey it to others. The Welles driver was reasonably entitled to rely on the left-turning driver and the drivers, pedestrians or bicyclists in other lanes, trails or sidewalks to exercise adequate caution to avoid colliding. It is not reasonable to insert the courteous yielding driver into that equation.

4. The Better Reasoned Cases from Other Jurisdictions Support the Result Reached by the District Court.

The act of signaling does not generally create a duty to ensure safety of other operators on the highway. See, e.g., *Gilmer v. Ellington*, 70 Cal. Rptr. 3d 893, 159 Cal. App. 4th 190 (2008); *Hoekman v. Nelson*, 2000 S.D. 99, 614 N.W.2d 821 (S.Dak. 2000); *Williams v. O'Brien*, 669 A.2d 810 (N.H. 1995); *Giron v. Welch*, 842 P.2d 863 (Utah 1992); *Duval v. Mears,*

602 N.E.2d 265 (Ohio App. 1991); *Dawson v. Griffin*, 249 Kan. 115, 816 P.2d 374 (1991); *Peka v. Boose*, 172 Mich. App. 139, 431 N.W.2d 399 (1988). Not all jurisdictions come to the same result. See generally anno.: *Motorist's Liability for Signaling Other Vehicle or Pedestrian to Proceed, or to Pass Signaling Vehicle*, 14 ALR 5th 193 (1993 + supp.). The signaling driver issue has been presented in a number of contexts. Besides signals to allow a left-turning driver to proceed, the cases in the annotation also address signals to allow following vehicles to pass, to allow the vehicles on side streets, parking lots or driveways to cross or enter a through street, and signals to pedestrians to cross traffic. If cases addressing the narrow issue presented in this case of a signal to permit a left turn in congested traffic are addressed, there are very few states that would impose liability on the signaling driver.

California appears to be the most recent state to address the narrow issue present in this case as a matter of first impression. *Gilmer v. Ellington, supra*. *Gilmer* is persuasive because of the quality of its legal reasoning and because of the close analogies between that case and the case now before the Court. Like this case, the initial decision to dismiss the signaling driver was made on a motion on the pleadings. *Gilmer*, 70 Cal.

Rptr. 3d at 895. Factors the court considered in deciding the existence of a duty are similar under California law and Montana law. *Id.*, 70 Cal. Rptr. 3d at 897.

The facts in *Gilmer* were also closely analogous to the facts in this case. The plaintiff Gilmer was operating a motorcycle in the outside lane of a four-lane city street. The defendant Ellington had stopped in the inside lane and signaled to the co-defendant Cherry, who was waiting to make a left turn, that Cherry could proceed. When Cherry made the left turn, Cherry and Gilmer collided. Gilmer sued both Cherry and Ellington. The trial court granted Ellington's motion to dismiss on the pleadings, and the California Court of Appeals affirmed.

The *Gilmer* court first looked at the obligations of drivers under California's traffic laws and determined that a driver has obligations to determine that a left turn is safe and to yield the right-of-way to oncoming vehicles that are close enough to constitute a hazard. *Id.* at 897-99. The Montana statutes are to the same effect. See, e.g., §§ 61-8-328(4), 61-8-336, 61-8-340, MCA. In addition, the Montana traffic code provides that the interpretation of Montana's traffic statutes "must be as consistent as

possible with the interpretation of similar laws in other states." Section 61-8-102(1), MCA.

The court in *Gilmer* then determined that the signaling driver had no duty for three primary reasons. First, the signaling driver did not have blame for the collision because the California legislature had imposed upon left-turning drivers, not oncoming drivers, the duty to determine whether it was safe to make the turn across oncoming lanes of traffic. As in Montana law, there was nothing in California law to allow that duty to be delegated to oncoming drivers. The court went on to state, "[t]he fact that one polite driver elects to waive his right-of-way to a left-turning vehicle does not cloak that driver with moral opprobrium. We should encourage cooperative drivers, not penalize them." *Id.* at 899.

Second, it would place an unreasonable burden on yielding drivers to impose upon them the duty of assuring that the left-turning driver could complete the left turn safely. The signaling driver has very limited tools to determine whether the left turn can be completed safely and the signaling driver has virtually no ability to anticipate how quickly the left-turning driver will complete the maneuver. The *Gilmer* court stated, "[b]ecause a yielding driver is in a poor position to make the speed and distance

calculations necessary to ascertain whether oncoming vehicles are close enough to constitute a hazard to a left-turning vehicle, it would be unreasonable to impose that duty on the yielding driver." *Id.* (footnote omitted); see also *Hoekman*, *supra*, 614 N.W.2d at 825.

Finally, the *Gilmer* court concluded that policy considerations dictated that a signaling driver not be burdened with a duty of determining whether the left turn could be made safely. To use the words of the *Gilmer* court:

> Finally, there would be reactive negative consequences to the community by imposing a duty on the yielding driver; most notably, a relaxed vigilance by left-turning drivers who may rely unthinkingly on ambiguous signals from other drivers, or at least claim to have done so. At a time when "road rage" is unhappily common [citation omitted], the added duty may further erode what infrequent civility is left on the roads. If the common courtesy of yielding the right-of-way results in lawsuits, we can expect further egocentric driving.

Gilmer, 70 Cal. Rptr. 3d at 900.

Other well reasoned decisions have come to the same result. In *Peka v. Boose*, *supra*, the Michigan Court of Appeals concluded, that where "all participants . . . were [adult] motorists driving in ordinary circumstances (i.e., no unusual obstacles or obstructions)," a driver who signals permission to a left-turning driver to allow the turn in front of the signaling driver's

vehicle assumes no duty to warn of the approach of other drivers. *Id.*, 431 N.W.2d at 401. As the court stated: "We find as a matter of law that [the signaling driver]'s hand motion signified nothing more than permission to cross in front of her car and could not be relied upon as assurance that all was clear ahead." *Id.*; see also *Duval v. Mears*, 602 N.E.2d 265, 267 (Ohio App. 1991) (the act of signaling driver was no more than an act of courtesy); *Hoekman*, *supra*, 614 N.W.2d at 825 ("while there is a split of authority on this issue, the more persuasive line of cases determine that a motorist signaling to a pedestrian or another motorist in a factual situation such as the one before us does no more than yield the right-of-way, rather than signal it is safe to proceed across another lane of traffic.").

5. Lokeys Cite a Number of Cases that are Either Distinguished on the Facts or Actually Support Welles.

Welles concedes that in some states the courts might allow these facts to go to a jury. In urging the Court to follow such states, however, Lokeys cite numerous cases that either involve factual circumstances that are not analogous or, when read in their entirety, substantially support Welles' position over Lokeys'. For example, *Bell v. Giamarco*, 553 N.E.2d 694 (Ohio App. 1988), involved the death of a five-year-old who obeyed the

signal of an adult driver to cross the street. Children, especially small children, involve different considerations than adults. Indeed, in a case decided three years after *Bell* on facts very similar to those in this case and in *Gilmer v. Ellington*, *supra*, the Ohio courts held that a hand signal made to an adult driver was no more than an act of courtesy and could not be the basis of liability. *Duval v. Mears*, *supra*. In arriving at that result, the court in *Duval* expressly distinguished *Bell*. *Duval*, 602 N.E.2d at 267-68.

Lokeys also cite three Michigan cases to suggest that the law of Michigan supports their desired result, but failed to cite *Peka v. Boose*, *supra*. In *Peka*, the Michigan Court of Appeals squarely held on facts that correspond to this case that where participants are adult motorists under ordinary circumstances, the hand signal merely indicates permission to make the turn "and could not be relied upon as assurance that all was clear ahead." *Peka*, *supra*, 431 N.W.2d at 401. Indeed, the *Peka* court distinguished one of the cases Lokeys cite, *Sweet v. Ringwelski*, 106 N.W.2d 742 (Mich. 1961), because it involved an adult driver signaling a ten-year-old pedestrian. The other two Michigan cases that Lokeys cited are also distinguishable. In *Lindsley v. Burke*, 474 N.W.2d 158 (Mich. App. 1991), the Michigan Court of Appeals affirmed the trial court's refusal to set aside

a default. Aside from the procedural distinction, on the facts, the signaling driver was not yielding the right-of-way out of courtesy. To the contrary, he was signaling to the second driver to exit a driveway so that the signaling driver could turn into it. The third case, *Gamet v. Jenks*, 197 N.W.2d 160 (Mich. App. 1972), like *Bell, supra*, involved an adult driver signaling the minor plaintiff that it was safe to proceed across the street.[4]

The Louisiana case of *Perret v. Webster*, 498 So. 2d 283 (La. App. 1986), does not appear to state Louisiana law when applied to the facts of this case. *See Government Emp. Ins. Co. v. Thompson*, 351 So. 2d 809 (La. App. 1977) (only left-turning driver could be held liable, not driver making courteous gesture). *Perret*, the case relied on by Lokeys, appears to involve the opposite of a courteous driver. That case involved a bus driver who wanted to turn onto a street and who therefore motioned several times (according to independent witnesses–the driver denied making any signal) for the disfavored driver to proceed across the street. Other distinguishable cases include *Woods v. O'Neil*, 767 N.E.2d 1119 (Mass. App. 2002)

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[4]The decision actually affirmed summary judgment in favor of the signaling driver based on deposition testimony of the teenage plaintiff that he had not relied on the hand signal in entering the lane of travel where he was struck.

(fourteen-year-old pedestrian), and *Miller v. Watkins*, 355 S.W.2d 1 (Mo. 1962) (school bus driver stopped to pick up a seven-year-old student on the opposite side of the street but signaled an oncoming driver to go through); *Cunningham v. National Service Industries, Inc.*, 331 S.E.2d 899 (Ga. App. 1985) (truck driver wanting access to driveway signals for driver to exit the driveway); *Thelen v. Spilman*, 86 N.W.2d 700 (Minn. 1957) (truck driver flashed lights to following driver that coast was clear).

In addition to the cases that are distinguishable on the facts, there are a number of cases cited by Lokeys that, upon closer analysis, substantially support Welles' position. *Askew v. Zeller*, 521 A.2d 459 (Pa. Super. 1987), presents facts similar to those in this case, except that it involved a motorcycle instead of a bicycle. Like this case, the motorcyclist was on the shoulder of the road passing stopped vehicles. The trial court granted the signaling driver's summary judgment on the basis there was no proximate cause as a matter of law. The court of appeals affirmed on the causation issue. In dicta, the court indicated that whether the signaling driver had a duty depended upon whether the driver was intending to signal that turn was safe or was merely intending to signal that he was conceding the right-of-

way. The concurring judge on the three-judge panel did not join the other two with respect to that dicta.

Lokeys cite *Williams v. O'Brien*, 669 A.2d 810 (N.H. 1995), although the case strongly supports Welles. In that case, the New Hampshire Supreme Court affirmed the dismissal on the pleadings of the signaling driver and held that absent special circumstances, there was no duty on the part of the signaling driver. The court gave as an example of such circumstances where a truck on a hill signals the following driver that it was clear to pass. *Id.*, 669 A.2d at 812-13. No special circumstances are alleged in this case.

Giron v. Welch, 842 P.2d 863 (Utah 1992), another case relied upon by Lokeys, reaches virtually the same result as the *Williams* case except that the court was affirming a summary judgment rather than a dismissal on the pleadings.

Kerfoot v. Waychoff, 501 So. 2d 588 (Fla. 1987), involved a motorcycle, a left-turning vehicle, and a signaling driver. The Florida Supreme Court was answering a question certified to it by an intermediate court of appeal: Does an automobile driver who, by signals, relinquishes his right-of-way to another vehicle, owe a duty to reasonably ascertain

whether traffic lanes other than his own will safely accommodate the other vehicle? The Florida Supreme Court affirmed the dismissal of the signaling driver holding that absent special circumstances, the signaling driver can only be reasonably relied upon to represent the safety of the lane the driver occupied.

Kemp v. Armstrong, 392 A.2d 1161 (Md. App. 1978), is distinguishable on the facts but still provides support for Welles' position. There, the signaling driver was operating a garbage truck in the middle lane of three eastbound lanes of traffic and signaled a second garbage truck that was slightly ahead that it was safe to change lanes. The truck changing lanes proceeded from the outside eastbound lane across the center eastbound lane all the way to the inside eastbound lane, where a car and motorcycle collided with the rear of the garbage truck. A trial of the matter resulted in a verdict in favor of the plaintiffs against both truck drivers. The Maryland Court of Appeals reversed the judgment against the signaling driver. While the basis of the decision was a lack of proximate cause rather than a lack of duty, the court found support for its holdings in three other cases where courts had held the signaling driver does not have a duty to

determine the safety of the maneuver and only indicates the signaling driver's intention to yield the right-of-way.[5]

CONCLUSION

For the reasons set forth above, this Court should affirm the District Court's dismissal of Welles.

RESPECTFULLY SUBMITTED this 3rd day of August, 2010.

MOORE, O'CONNELL & REFLING, P.C.

BY: _____
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[5]The three cases are *Dix v. Spampinato*, 358 A.2d 237 (Md. 1976); *Van Jura v. Row*, 191 N.E.2d 536 (Ohio 1963); *Devine v. Cook*, 279 P.2d 1073 (Utah 1955), all of which are analogous to the allegations in this case.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(d) of the Montana Rules of Appellate Procedure, I certify that this *Brief of Appellee* is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; WordPerfect 10.0; and has a word count of **6,283**, not averaging more than 218 words per page, excluding the table of contents, table of citations, certificate of service, and certificate of compliance.

Dated this 3rd day of August, 2010.

ALLAN H. BARIS, *Attorney for Defendant/Appellee A.M. Welles, Inc.*

CERTIFICATE OF MAILING

This is to certify that the above and foregoing was duly served upon counsel of record at their addresses by postage prepaid, this 3rd day of August, 2010, as follows, to-wit:

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